IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 791

RONALD L. CRANE, *Petitioner*,

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY CO., *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Iowa

BRIEF FOR THE PETITIONER

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INDEX

TABLE OF AUTHORITIES

MISCELLANEOUS: Page

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OPINION BELOW

The District Court of Linn County, Iowa, did not write an opinion. The opinion of the Supreme Court of Iowa, printed at Single Appendix (A.) 134, is reported at 160 N.W. 2d 838.

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on September 5, 1968. The Petition for A Writ of Certiorari was filed on December 3, 1968, and granted on January 20, 1969. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Is the defense of contributory negligence available against a non-employee held to be within the class whom Congress intended to protect under the federal Safety Appliance Act, where this Court has ruled that a railroad's violation of the Act imposes absolute liability, and where the same person, if an employee, could recover under the same facts regardless of his own negligence?

STATUTES INVOLVED

This case involves §§ 2 and 7 of the Safety Appliance Act, 27 Stat. 531, 532 (1893), 45 U.S.C. §§ 2 and 7 (1954), and §§ 1, 3 and 4 of the Federal Employers' Liability Act, 35 Stat. 65, 66 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. §§ 51, 53 and 54 (1954). All are set out in Appendix A, *infra*.

STATEMENT OF THE CASE

At the time of his injury in Cedar Rapids, Iowa, on March 21, 1963, petitioner Ronald L. Crane was employed in his customary duties of moving, weighing and loading railroad cars on a spur track servicing the meal house and elevator of Crane's employer, Cargill, Inc. The cars had been delivered by the respondent railroad to the spur track (A. 8-9, 80-81). After loading, the cars would be picked up by respondent for shipment

to their ultimate destination (A. 23, 25, 77-81). At about 1 a.m. that morning, a co-employee (Harris), uncoupled two of a string of six such cars, and, using a winch and cables, moved them to a scale for weighing (A. 25-26, 67-68). After weighing, the two cars were winched back into the stationary and braked cars with sufficient force to recouple, had the couplers complied with the federal Safety Appliance Act (A. 26-28, 32-33, 46-50, 68). The couplers between the connecting cars appeared to lock but in fact did not (A. 27-28, 40, 44, 73-74).[1] At about 4 a.m. that morning, Harris at-

[1] Respondent argued in its Brief in Opposition to Crane's Petition that this case should have been affirmed by the Iowa Supreme Court on the non-federal ground that Crane had failed to establish improper equipment on the cars. In fact, argued respondent, the evidence showed "without dispute" that because of the speed of coupling and the curvature of the track, the knuckles should have been in a certain position and "there was no evidence which would permit the jury to find" that the knuckles were so positioned (pp. 2-3).

There are two ready answers to these arguments. First, they were presented at length to the trial court in a motion for a directed verdict at the conclusion of Crane's case (A. 86-91) and at the conclusion of all the evidence (A. 121-123), and rejected by the court on both occasions (A. 91, 123). They were argued in respondent's brief to the Iowa Supreme Court (pp. 100-126) and again rejected (A. 134-138). It is not open to respondent to argue to this Court that the case should have been decided on some non-federal ground rejected by both state courts below.

Secondly, respondent's argument about what the evidence showed is simply erroneous. While *respondent's* witnesses testified along the lines of its argument, Crane's witnesses testified otherwise. For example, a retired switchman who had coupled and uncoupled over a million cars in his forty-one years of experience (A. 47) testified that "One mile an hour or less would close the knuckle" (A. 48), that "the origin of the power of the car through these various means makes no difference whatever" (*ibid.*), that winching has the same directional force as pushing by drawbar (A. 50), that "You don't need any jolt or jar" to close couplers (A. 53), that "the impact has nothing whatever to do with it. If you get

tached cables to the second car in the string, while Crane boarded the third car to release its brakes so that the string could be moved (A. 25-26, 68). But when Harris began to use the winch to move the string, the two cars at the head of the string broke away and headed down an incline toward the elevator (A. 27-28, 68). On the elevator scale stood a box car in which, from past experience, Crane believed other men were working (A. 25-26, 27-28).

Petitioner Crane therefore immediately braked the car upon which he was stationed, dismounted, and ran after the moving cars to prevent a collision with the box car near the elevator (A. 25-26, 28). Crane caught up with the runaway cars, climbed onto the brake platform of one and, while operating the brake to stop the

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the knuckle completely closed the pin will drop" (A. 55), and that "There are things other than broken parts which can cause couplers not to work automatically by impact, such as wear, rust, evaporation, ice can get into the inner working parts and prevent the block from dropping, and snow can get into an open knuckle requiring one to dig it out before the mechanism will operate. Because of such factors the couplers can work one time and not another" (A. 62). He was asked this question: "Now, assume, Mr. McGuire, that two boxcars, two empty boxcars were moved by means of an electric winch and a cable and they were brought together and against a string of four cars, the first one of which—which the contact would be made had a hand brake on the car, and a set hand brake, and that the coupler on the standing car was open, and the two empty boxcars came against these four standing cars with sufficient force to move the string of four cars with the brake on one of them a few feet to five feet, do you have an opinion, Mr. McGuire, as to whether these cars should have coupled?" (A. 49). His answer was: "My opinion is that the coupling should make" (A. 49). There was much more testimony from the nine witnesses who testified for Crane (A. 22-86)—see particularly the answers of Mr. Martin at A. 105-106—but the above illustrates that respondent's view of the evidence seems to have begun and ended with its own case.

cars, fell twelve to fourteen feet from the brake platform, landing on a cement apron between the tracks (A. 28-29, 68-70). Respondent was the exclusive delivering and pick-up carrier (A. 80-81). The trial court instructed the jury that the railway cars on which Crane was working were being used by respondent as part of its system (A. 128).[2] In an attempt to avert injury to others and damage to respondent's cars, Crane was thus injured in the furtherance of respondent's interstate commerce.

Crane, twenty-two years old at the time of the accident and the father of three children (A. 22), sustained fractures of both feet, serious injuries to the surrounding ligaments and soft tissue, and arthritis caused by the trauma (A. 65). According to uncontradicted medical testimony, he suffers from permanent impairment of thirty percent of the left lower extremity and twenty-five percent of the right lower extremity, permanent limitation of motion, and permanent pain (A. 65-66, 30). He is unable to run except with an excessive limp, has difficulty in making rapid motions, and suffers from pain and disability when doing prolonged and repetitive work (A. 66, 30). The injuries he sustained have eliminated some sources of potential employment, particularly jobs requiring walking on rough ground or mounting ladders (A. 66). Thus Crane has been unable to return to his work at Cargill (A. 29-30).

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[2] The mealhouse tracks are maintained exclusively by respondent and are part of a continuous set of tracks running north from respondent's office to Cargill, Inc., and continuing north of Cargill, where they connect with other tracks of respondent (A. 114-115). The bills of lading for the first four of the six cars involved (Exs. 42-45) showed that the cars were destined for consignees located at Portland, Oregon; Portsford, British Columbia; Nampa, Idaho; and Coffeeville, Kansas (A. 85, 114-115).

or to his previous job as an aluminum siding applicator (A. 22-23), which requires the use of ladders and scaffolding (A. 29-30). In addition, he has experienced difficulty in standing for long periods and working on ladders as part of his present job as an arc welder (A. 29-30). He underwent two operations and was unable to regain full-time employment until July of 1964, almost a year and a half after his accident (A. 29-30, 65-66).

Crane filed suit in the District Court of Linn County, Iowa. His original complaint was in three counts—the first based on negligence, the second on the federal Safety Appliance Act (45 U.S.C. § 2), and the third on res ipsa loquitur—but the first and third counts were dismissed (A. 2-6, 91). Therefore, only the count alleging a violation of the Safety Appliance Act went to the jury, and only that count was involved in the appeal to the Iowa Supreme Court and is involved here.

A dispute arose even before trial about the role of contributory negligence in a suit under the Act. Crane contended from the outset, in answer to a specific question from the court (A. 18), that the Act created an absolute liability and that contributory negligence was no defense (A. 18-19, 20). Respondent contended otherwise (A. 20), and the court agreed with respondent. The court held in a pretrial order that "the law of this case" was to be as follows:

> 1. That a violation of the Safety Appliance Act (45 USCA 2) is negligence as a matter of law, but that, in cases brought in this court not based on the Federal Employers' Liability Act, the following rules apply:
>
> a. The liability is not absolute;

b. All common law defenses except the defense of assumption of risk apply;

c. The burden is on plaintiff to show his freedom from contributory negligence;

d. The violation must be a proximate cause of plaintiff's damage.

2. That the Safety Appliance Act requires that the cars to which it applies be equipped with couplers which will couple automatically by impact when set in an "open" position and will thereafter remain coupled until set free by some purposeful act of control and that the impact referred to is an impact of force equal to or greater than the impact normally employed by the railroad in coupling cars.

3. That the employee of a consignee properly engaged in unloading cars on a siding under control of the railroad is within the class of persons protected by the Safety Appliance Act.

4. That, if the railway siding or spur involved in this case is laid on public property or is not on the Cargill property, it is part of the main line of defendant railway. * * * [A. 21-22]

In other words, the law of the case was that violation of the Act did *not* create absolute liability, that all common law defenses but one applied, and, further, that Crane himself had the burden to prove his freedom from contributory negligence.

These same rulings carried over to the instructions to the jury. The court instructed that "Failure to comply with [the coupling provision of the Act] constitutes negligence" (A. 128), and that it was necessary for Crane "to establish by a preponderance or the greater weight of the evidence * * * That plaintiff was

free from contributory negligence" (A. 128-129). The court defined contributory negligence to mean "negligence on the part of a person injured, either in person or property, which contributed *in any way or in any degree* directly to the injury" (A. 129-130; emphasis added). These instructions were given over Crane's objection that they failed to tell the jury that violation of the Act "results in absolute liability" (A. 126), they erroneously informed the jury that violation of the Act "constitutes negligence" (*ibid.*), "the jury should not be instructed on contributory negligence nor should it be plaintiff's burden" (A. 127), and "reasonable care, negligence, and contributory negligence is not a part of the case" (A. 128).

The jury, without separate findings or elaboration of any kind, found in favor of respondent (A. 131).

SUMMARY OF ARGUMENT

Section 2 of the Federal Safety Appliance Act, 45 U.S.C. § 2 (1954), imposes an absolute duty on railroads to use only cars which couple automatically on impact and stay coupled until intentionally released. The purpose of the Act is to protect both railroad employees and non-employees (such as petitioner Crane) from injuries caused by defective railroad equipment. Violation of the Act, this Court has ruled, results in "absolute liability" to employees and non-employees alike. *Shields* v. *Atlantic Coast Line R.R. Co.*, 350 U.S. 318, 325 (1956).

Contrary to this Court's mandate to sweep "all issues of negligence out of cases under the Safety Appliance Act," *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U.S. 384, 390 (1949), the Iowa trial court (affirmed by the Supreme Court of Iowa) instructed that negli-

gence on the part of petitioner contributing "in any way or in any degree" to his injury excused the railroad's violation of its absolute duty. But the language and reasoning of recent decisions by this Court under the Act, as commentators have pointed out, abolish contributory negligence as a defense, instead imposing "absolute liability" on the railroad using defective equipment. And in earlier cases this Court has looked to Congressional intent, particularly as revealed in the Federal Employers' Liability Act, 45 U.S.C. § 53 (1954), to strike common-law negligence defenses from Safety Act actions.

Uniform interpretation under federal law of the consequences of violating the Act's uniform federal standard guarantees even-handed treatment of all persons injured by defective railroad equipment. To permit state negligence law to govern Safety Act actions would result in confused and chaotic enforcement of the Act, based solely on the happenstance of the location of the injury. Furthermore, to affirm the decision below would mean that railroad employees—most familiar with the dangers of railroad equipment—could recover regardless of their contributory negligence; while non-employees—less able to discover defective equipment—would be denied all recovery, and the railroad allowed to escape all liability, if the non-employee was negligent "in any way or in any degree." Congress could not have intended such an absurd result. Once it is determined, as all concede here, that the injured person falls within the class Congress meant to protect under the Safety Act, then Congress surely intended that absolute liability be imposed without regard to the multifarious and differing defenses available in common law negligence cases.

ARGUMENT

This case raises an important question for all of those non-employees who are injured each year in railroad accidents.[3] It is whether a railroad's violation of the federal Safety Appliance Act has the same legal consequences for a non-employee working on defective railroad equipment as for an employee, where both are persons whom Congress intended to protect under the Act. The Supreme Court of Iowa, while affirming the judgment for the respondent railroad, acknowledged that recent decisions of this Court "contain language which tends to support plaintiff's position * * *"[4] — that violation of the Act imposes absolute liability on the railroad for which the contributory negligence of employee or non-employee plaintiffs is no defense.

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[3] Almost 2,000 train accidents occurred last year in the United States as a result of defective equipment—or more than a quarter of all train accidents in the country. Close to 400 of these were attributable to coupler defects. In addition, couplings were in some way involved in "train service" accidents (those causing smaller damages to cars than "train" accidents) which killed or injured almost a thousand persons. In fact, train and train service accidents to persons other than employees, passengers and trespassers accounted for 1,632 persons killed and 4,048 injured in 1967 alone. Over the past seven years, the *monthly* average of railroad accidents has increased steadily from 341 in 1961 to 590 in 1967. The problem has now reached the point where the United States, during the most recent six-month period, brought suit to recover statutory penalties for 347 Safety Act violations. These statistics are derived from U.S. Department of Transportation (Federal R.R. Administration), Accident Bull. No. 136, Tables 5, 16, 24 (1968); Statement by Alan S. Boyd, Secretary of Transportation, accompanying proposed Federal Railroad Safety Act of 1968, April 29, 1968; U.S. Department of Transportation (Federal R.R. Administration), Press Releases, Sept. 30, 1968, Sept. 16, 1968.

[4] *Crone v. Cedar Rapids & Iowa City Ry. Co.*, 160 N.W. 2d 838, 842-43 (Iowa 1968) (A. 139).

The Court below, however, declined to decide "whether these cases are harbingers of a change in position by the U.S. Supreme Court or merely imprecise language which frequently appears in dictum * * *".[5] Therefore, the Iowa court followed statements in earlier decisions by this Court which, at least without reference to their context, seemed to support the railroad's position. The Iowa court said it felt powerless "to place [a different] interpretation on the federal statutes * * *."[6] It is our position that this Court's more recent rulings referred to by the Iowa court correctly express Congress' intent to impose absolute liability regardless of who brings the suit, so long as he is covered by the Act.

1. Section 2 of the Safety Appliance Act provides:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars [27 Stat. 531 (1893), 45 U.S.C. § 2 (1954)].

This Court has held that Section 2 requires railroad cars covered by the Act to use couplers which couple automatically upon impact and stay coupled until released by some purposeful act.[7] Petitioner Crane suffered serious and permanent injuries (A. 65-66) when he fell from a runaway railroad box car which he was

[5] *Id.* at 843 (A. 139).

[6] *Ibid.*

[7] *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U.S. 384, 389 (1949).

attempting to brake before it struck another car in which he believed men were working (A. 28). The allegedly defective car, temporarily delivered by the respondent railroad for loading by Cargill, Inc., Crane's employer, was, at the time of Crane's accident, being used by the respondent as part of its system or line (A. 128), and the trial court expressly found that as "an employee of a consignee properly engaged in unloading cars on a siding under the control of the railroad," Crane stood within the class of persons protected by the Safety Appliance Act (A. 21-22).[8] The case went to the jury on one count alleging violation of the automatic coupler provision of that Act (A. 2-6).

This Court ruled twenty years ago that its decisions "early swept all issues of negligence out of cases under the Safety Appliance Act. * * * [A] failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence." *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, *supra*, 338 U.S. at 390. Unlike actions brought under the Federal Employers' Liability Act (FELA) based solely on negligence,[9] statutory liability in actions alleging Safety Act violations "is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous." *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938).

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[8] On appeal, the Iowa Supreme Court stated: "This holding is supported by the authorities and is not challenged here." *Crane* v. *Cedar Rapids & Iowa City Ry. Co.*, *supra*, 160 N.W. 2d at 841 (citations omitted).

[9] See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 188-189 (1949).

Corresponding to the absolute duty to comply with the Safety Act, violation of the statute's plain prohibition gives rise to "the liability to make compensation to one who is injured by it." *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor, supra,* 210 U.S. at 295; *Fairport, Painesville & Eastern R. R. Co.* v. *Meredith,* 292 U.S. 589, 596 (1934). Where a non-employee plaintiff falls within the class protected by the Safety Act, there is absolute liability, for as this Court said in *Shields* v. *Atlantic Coast Line R.R. Co.,* 350 U.S. 318, 325 (1956):

> There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability.

Congress, appalled by the injuries and consequent financial burdens imposed on men working on and about railroads, adopted the Safety Act to change the master-servant duty at common law "and its resulting liability * * *."[10]

The broad interpretation thus accorded the Act is illustrated by *Coray* v. *Southern Pacific Co.,* 335 U.S. 520 (1949). An employee of the railroad was killed

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[10] *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor, supra,* 210 U.S. at 294. See S. Rep. No. 1049, 52nd Cong., 1st Sess. (1892); H.R. Rep. No. 1678, 52nd Cong., 1st Sess. (1892). See also *United States* v. *Seaboard Air Line R. R. Co.,* 361 U.S. 78, 82-83 (1959) (the Safety Act "should be liberally construed as a safety measure").

when the motorcar on which he was riding crashed into the back of a train which had stopped because of faulty brakes. The deceased could have stopped in time if he had been looking, but the Court held that "contributory negligence is not a defense to this action." *Id.* at 521 n. 2. The Utah courts were of the view that insofar as brakes were concerned, the Act was designed to protect persons from moving trains, not from those standing still. This Court disagreed in the following language.

> We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees *and others* as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect *all who need protection* from dangerous results due to maintenance or operation of congressionally prohibited defective equipment "not from the position the employee may be in or the work which he may be doing at the moment when he is injured." * * * In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliance, petitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death. * * * [*Id.* at 522-523; citations omitted; emphasis added.]

The trial judge in the instant case failed to follow this Court's mandate to sweep negligence issues out of actions based on the Safety Act, instructing instead that breach of the Safety Act's admittedly absolute duty amounts only to "negligence", defined as "want of or-

dinary care";[11] that "negligence on the part of a person injured * * * which contributed in any way or in any degree directly to the the injury" bars recovery; and that Crane must establish the railroad's "negligence" and his own freedom from "contributory negligence" (A. 128-130). In fact, the trial judge equated a violation of the Act with "negligence" in five separate paragraphs of his instructions to the jury (A. 128-130). This Court, on the other hand, has expressly stated that violation of the Act's absolute duty is unrelated to negligence, and in particular that a plaintiff is "entitled to a peremptory instruction that to equip a car" with a defective coupler "was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered * * *." *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra,* 338 U.S. at 394; *Affolder* v. *New York, Chicago & St. Louis R.R. Co.,* 339 U.S. 96, 99 (1950).

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[11] The use of this definition might well have misled the jury into concluding that exercise of ordinary care by the railroad excused violation of the Safety Act. The law is otherwise. *E.g., O'Donnell* v. *Elgin, Joilet & Eastern Ry. Co., supra,* 338 U.S. at 390. As the Court has pointed out in the analogous situation of faulty brakes: "* * * the common law duty of the railway company to use ordinary care to provide and keep in reasonably safe condition adequate brakes for the control of its trains was one owing, among others, to travelers in the situation which the respondent here occupied. Sections 1 and 9 of the Safety Appliance Act converts this qualified duty imposed by the common law into an absolute duty, from the violation of which there arises a liability for an injury resulting therefrom to any person falling within the terms and intent of the act." *Fairport, Painesville & Eastern R.R. Co.* v. *Meredith, supra,* 292 U.S. at 596.

Instructions to that effect were requested below by Crane and were refused (A. 124-128).[12]

Breach of the Safety Appliance Act and the analogous Boiler Inspection Act[13] imposes stricter liability on defendant railroads than does the "conventional tort doctrine" of absolute liability. *Urie* v. *Thompson, supra,* 337 U.S. at 195 n. 34. As Dean Prosser has pointed out, the Federal Safety Appliance Act imposes a liability beyond that even of most safety legislation, "for whose violation there is no recognized excuse." Prosser, *Law of Torts* 198-99 (3d Ed. 1964). Other disinterested commentators have pointed to the significance of the more recent decisions by this Court interpreting the Safety Act:

> But for the Court in [*O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra*] the concept of negligence is wholly irrelevant to a Safety Appliance Act cause of action. The liability for violation of the Act is absolute. No showing of care can exculpate. This reasoning quite clearly assimilates the Safety Appliance Act to that class of statutes which are construed to place the entire responsibility upon the violators of the statutes, and hence to abolish contributory negligence as a defense. * * * [S]tatutes of this class * * * are the product of deliberate social policy which, for one reason or another, puts the entire burden of protecting against the specified risk on the shoulders of only

[12] In contrast to the instructions given here, this Court has approved an instruction that negligence is not an issue in an action based on violation of the analogous Boiler Inspection Act, 36 Stat. 913 (1911), as amended, 45 U.S.C. §§ 22-34 (1954), and that the plaintiff should recover for breach of the defendant's "absolute and continuing duty" to comply with the statute. *Urie* v. *Thompson, supra,* 337 U.S. at 168.

[13] 36 Stat. 913 (1911), as amended, 45 U.S.C. §§ 22-34 (1954).

one party to the transaction. Thus, to state that a statute of this type *abolishes the defense of contributory negligence,* is but to state the obverse of the proposition that it places absolute liability—the entire burden—upon the violator.

From the political and sociological viewpoint, it is hardly surprising that an era which provided widespread workmen's compensation coverage for most industrial employees, with its *total abolition of negligence and contributory negligence* and its acceptance of the philosophy that "the cost of the product shall bear the blood of the workmen," would also provide for workers on railroad equipment, injured by specifically prohibited defects in appliances, protection against their own contributory negligence.

* * *

Thus * * * [*O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra; Carter* v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430 (1949); *Affolder* v. *New York, Chicago & St. Louis R.R. Co., supra*], the most recent Supreme Court cases which analyze the nature of a Safety Appliance Act cause of action, are at least implicit authority for the proposition that *the contributory negligence of the injured person is no defense to an action under this Act.* Since the Act constitutes permissible congressional regulation of interstate commerce, the absolute standards which it prescribes, and the consequences of those standards including *the inadmissibility of contributory negligence as a defense to violation of the standards, are applicable whenever the Act itself is applicable.* Thus, there is imposed by the Act, as the obverse of the coin of absolute federal standards, *the obliteration of contributory negligence as a defense to violation of the Act.* * * *[14]

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[14] Louisell & Anderson, "The Safety Appliance Act and the FELA: A Plea for Clarification," 18 Law & Contemp. Prob. 281, 290-91 (1953) (footnotes omitted; emphasis added).

If Crane had been an employee of the railroad, contributory negligence would not have barred his recovery for breach of the Safety Act had he pursued his rights under FELA (45 U.S.C. § 53 (1954)). Here Crane's work furthered respondent's interstate commerce. He was engaged in weighing, moving and loading cars in use and supplied by the railroad on tracks which were part of the railroad's line, and was employed by the consignee of goods shipped over the railroad's line. The trial court properly instructed that the cars on which Crane was working "were being used by the defendant as part of its system" (A. 128). Yet the court denied him the protection which Congress explicitly grants to employee plaintiffs. This was error. FELA, rather than indicating an intent to so discriminate against non-employees, makes clear on its face that Congress intended instead to distinguish sharply between violations of the Safety Act and violations of ordinary negligence standards.

This distinction is pointed up by the fact that in common law negligence actions, Congress still allows contributory negligence to play a part, even when the suit is brought by a railroad employee. The contributory negligence of the employee in such actions proportionately reduces his recovery. 45 U.S.C. § 53 (1954). But when the action is based instead on a violation of federal safety standards, contributory negligence disappears as a defense. Thus, Congressional policy, as expressed in FELA and the Safety Act, supports extending special protection to all workers on railroad equipment, just as this Court's recent opinions have indicated. Imposing strict liability for failure to comply with the Safety Act's "absolute duty" comple-

ments penalizing the railroad for such violations regardless of fault. 45 U.S.C. § 6 (1967 Supp.).

There is a clear precedent for the type of ruling we seek here. Over sixty years ago, in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor, supra,* this Court struck the fellow-servant defense from actions charging Safety Act violations, even though the Act expressly abolishes only assumption of risk as a defense. The administratrix of a railroad employee brought an action in a state court based solely on the railroad's failure to equip cars with draw bars as required under the Safety Appliance Act of 1893. The accident occurred prior to passage of FELA in 1908, which erased the fellow-servant doctrine in employee-railroad suits, and this Court did not mention that statute in its decision. Affirming the trial court's refusal to instruct that defendant escaped liability if the negligence of a fellow servant caused plaintiff's injury, this Court reasoned:

> * * * In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. * * * It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. *The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there

> arises from that violation the liability to make compensation to one who is injured by it. * * * It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. * * * But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. [210 U.S. at 294-96; emphasis added.]

Following the same reasoning, Congress could hardly have intended that the common law excuse of contributory negligence could be used to thwart the purpose of the Safety Act to impose the strictest liability for injuries caused by railroad equipment failing to meet the statutory requirements.

In suits based on accidents occurring after FELA's effective date, that statute provides a direct source of

Congressional policy for determining questions not expressly answered in FELA or the Safety Act. In *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10 (1938), the employee of a connecting carrier, but not of the defendant railroad, brought a state court action for injuries caused by the defendant's failure to equip its car with secure grab irons as required by the Safety Act. This Court ruled that although not an employee of the defendant, plaintiff nevertheless was covered by the Safety Act. Furthermore, even though the plaintiff was not "engaged in an operation in which the safety appliances are specifically designed to furnish him protection," the Court noted that its earlier decisions had "liberally construed" the statute so "that one can recover 'if the failure to comply with the requirements of the act is a proximate cause of the accident * * * ' " (303 U.S. at 15), and held for the plaintiff in light of the "comprehensive rule" laid down by Congress "as a matter of public policy." Finally, this Court ruled that assumption of risk provided no defense to the railroad's liability, citing *both* the Safety Act and FELA (303 U.S. at 16). The sections cited by the Court applied on their face only to employees of the defendant railroad; yet this Court adopted the statutory rule for employees relating to assumption of risk and extended it to a *non-employee* working on a railroad car not in compliance with the Safety Act.[15]

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[15] The Seventh Circuit has taken this approach to permit wrongful death actions based only on the Safety Appliance Act, by extending FELA provisions permitting such suits beyond the statute's literal boundaries to Safety Act suits. In *Ross* v. *Schooley*, 257 Fed. 290 (7th Cir.), *cert. denied*, 249 U.S. 615 (1919), the administratrix brought suit alleging that decedent, an employee of the defendant railroad, died of injuries caused by defective couplers. FELA did not apply because the plaintiff failed to

Surely if this Court could eliminate the fellow-servant and assumption of risk defenses absent a specific statutory provision to that effect in order to further the obvious legislative intent of the statute, it can similarly eliminate the contributory negligence defense, where the congressional intent is even more obvious. In light of the special liability imposed by FELA for violations of the Safety Act only, this Court may properly find in FELA the rule governing contributory negligence as a defense in Safety Act suits.

Nothing in the history of either Act militates against this view. On the contrary, while most of the discussion in Congress obviously was about employees, since they were the group most likely to suffer injury, there is not a word in the legislative history of either the Safety Appliance Act or FELA to suggest that Congress intended to distinguish between employees and non-employees insofar as contributory negligence is concerned. Respondent has cited none. Instead, Congress' overriding interest was in imposing absolute liability in cases brought by those covered by the Act. Even respondent concedes that Crane was covered by the Act.

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allege and prove the connection to interstate commerce necessary to trigger that statute. Pointing out that implied liability for damages under the Safety Act spurs observance of its coupler provisions and thereby promotes the safety of those protected by the Act, the Seventh Circuit held: "Under the Employers' Liability Act there is no need to count upon any state statute creating a liability for wrongful death, because that liability was expressly stated by the Congress. *Inasmuch as the same legislative intent respecting liability is found in the Safety Appliance Act, the same result follows*" (257 Fed. at 291) (emphasis added). See also *Pennsylvania R.R.* v. *Logansport Loan & Tr. Co.*, 29 F. 2d 1, 3 (7th Cir. 1928).

The courts of Illinois have adopted petitioner's position here, contrary to the ruling and reasoning of the Iowa Supreme Court below. In *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.*, 34 Ill. App. 2d 330, 181 N.E. 2d 372 (App. Ct. 1962), plaintiff, an employee of another railroad, sued the defendant for injuries suffered while traveling on an interstate pass, alleging violation of the Safety Act's coupler provision. The pass, which the plaintiff signed, placed "all risk of damage" on him. Since the court found that federal law under the Safety Act and the Hepburn Act (49 U.S.C. § 1(7) (1959)) permits a carrier to exempt itself only from negligence liability, the case turned on the nature and consequences of liability for violating the Safety Act.

Rejecting the defendant's argument that breach of the Safety Act amounts only to "negligence per se," the Illinois court instead relied on the *O'Donnell, Carter, and Affolder* cases, *supra*, stating:

> * * * In every decision of the United States Supreme Court since the O'Donnell case in 1949, where the question has come before it, the court has consistently held that the violation of the Safety Appliance Act alone and a resultant injury creates a legal cause of action in no wise dependent upon any negligence theory. We find that the plaintiff does not charge the defendant with common law negligence, but charges it with absolute liability for violation of the Safety Appliance Act. [181 N.E. 2d at 375.]

At a new trial, the lower state court granted a summary judgment for the plaintiff on the issue of liability. Affirming, the Illinois Supreme Court agreed with the

earlier appellate decision that Congress "imposed absolute liability" for breach of the Safety Act, and held:

> Under these circumstances and in view of the absolute standard imposed by the Act, we deem that to enforce the exculpatory provisions of the pass would subvert the purpose of the Act and defeat the public interest. [38 Ill. 2d 31, 230 N.E. 2d 173, 178 (1967), *cert. denied*, 390 U.S. 949 (1968).]

And so here, just as Congressional policy bars an exculpatory agreement as a defense to Safety Act violations, contributory negligence similarly cannot be used as an excuse for avoiding liability caused by such violations.

The confused and chaotic enforcement of the Act that would result in the various states if the view of the Iowa Supreme Court were to be adopted by this Court involves far more than the single defense of a plaintiff's contributory negligence. For if that defense is available to railroads in suits by non-employees, so are all of the other common law and statutory defenses applicable in negligence suits in the various states. The following is a partial and illustrative list of such defenses, some of which would be available in almost every state, others in only one or two:

> —comparative negligence on the part of plaintiff reducing his recovery under the statutes of some states (some of which apply expressly to railroad injuries),[16] which set forth differing criteria and which have led to "an excessive number of appeals".[17]

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[16] *E.g.*, 21A Fla. Stat. Ann. § 768.06 (1964); 8 Va. Code § 56.416 (1968 Suppl.).

[17] Prosser, *Law of Torts* 448 (3d Ed. 1964).

—imputed contributory negligence of various types, some of which are applicable only in one state (*e.g.*, a bailee's negligence is imputable to his bailor only in Texas;[18] one spouse's to the other, only in a few community property states;[19] while the "barbarous rule"[20] imputing a parent's negligence to his child applies only in Maine).[21]

—release or waiver of any liability on the part of a defendant arising thereafter.[22]

—the exercise of "due care" on the part of defendant, a community standard taking into account local statutes, social customs, trade practices, and the importance of defendant's activities to the community—a concept necessarily varying from state to state.[23]

—the lower duty of care imposed on defendant where plaintiff is a trespasser or licensee.[24]

—no duty to protect against unforeseeable injuries, unforeseeable plaintiffs, or unforeseeable intervening causes (except that at least four states reject foreseeability as an essential element of negligence liability).[25]

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[18] *Rose* v. *Baker*, 158 Tex. 554, 160 S.W. 2d 515 (1942).

[19] *E.g.*, *Tinker* v. *Hobbs*, 80 Ariz. 166, 294 P. 2d 659 (1956).

[20] Prosser, *op. cit. supra* n. 17, at 504.

[21] *Gravel* v. *LeBlanc*, 131 Me. 325, 162 Atl. 789 (1932).

[22] Prosser, *op. cit. supra* n. 17, at 456.

[23] *Id.* at 154, 168-171.

[24] *Id.* at 364, 385.

[25] *Id.* at 302.

—"shifting responsibility"—*i.e.*, the assumption that some third person would look out for plaintiff's safety.[26]

—negligence on the part of plaintiff occurring after defendant's negligence act occurred.[27]

—greater or equal risk of harm to third persons avoided at the expense of plaintiff's injury.[28]

—negligence on the part of the plaintiff prior to or contemporaneous with defendant's negligence which aggravates his injury held to reduce his recovery in two states.[29]

—later wrongdoing of a third person excusing antecedent negligence of defendant in a few states.[30]

The result of engrafting these defenses onto the federal Act would be to permit an extraordinary variety of recoveries and denials of recovery from one state to the next, depending on the location of the accident, even though there is not the slightest indication that Congress intended any such multiformity of enforcement under this statute. The statute should have but a single standard, applicable everywhere. The interstate, high-speed character of a railroad's business demands such a standard, as does the intent of Congress.

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[26] *Id.* at 179.

[27] *Eg., Wingrove* v. *Home Land Co.*, 120 W. Va. 190, 196 S.E. 563 (1938).

[28] Restatement (Second) of Torts § 295 (1965).

[29] *O'Keefe* v. *Kansas City Western Co.*, 87 Kan. 322, 124 Pac. 416 (1912); *Wright* v. *Ill. & Miss. Tel. Co.*, 20 Iowa 195 (1866).

[30] *E.g., Hubbard* v. *Murray*, 173 Va. 448, 3 S.E. 2d 397 (1939).

Another example of the disparity of treatment that will be accorded plaintiffs under the federal Act if the Iowa view is upheld is the issue of which party carries the burden of proving or disproving contributory negligence. In Iowa, as illustrated by the instructions in this very case (A. 128-131), the plaintiff must prove by a preponderance or greater weight of the evidence that he was free of contributory negligence. Yet the rule in a majority of states is the opposite—that the defendant must prove by a preponderance of the evidence that the plaintiff was guilty of contributory negligence. Prosser, *Law of Torts*, § 64, p. 426 (3d ed. 1964); *e.g.*, *Danzansky* v. *Zimbolist*, 70 U.S. App. D.C. 234, 105 F.2d 457 (1939).

2. The Iowa Supreme Court cited several early decisions of this Court which suggest, at least in dictum, that the Safety Appliance Act does not abolish the defense of contributory negligence in non-employee actions.[31] But wholly apart from this Court's more recent rulings, careful analysis of the earliest case cited, *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 220 U.S. 590 (1911), on which later cases rely as authority, shows that the contributory negligence instruction given by the trial court below cannot stand even under that decision. The trial court instructed the jury,

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[31] *Fairport, Painesville & Eastern R.R. Co.* v. *Meredith*, 292 U.S. 589 (1934); *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934); *Tipton* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 298 U.S. 141 (1936). In the first two of these cases, this Court ruled favorably to the plaintiffs; in the third, the Court found state workmen's compensation to be an adequate remedy for Safety Act violations. In none of these three cases, therefore, was this Court's comment on contributory negligence controlling. The Iowa Supreme Court also cited *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), in which this Court did not mention contributory negligence.

over Crane's objections, that in order to recover Crane must establish by a preponderance of the evidence his freedom from "negligence * * * which contributed *in any way or in any degree* directly to the injury" (A. 129-130) (emphasis added).

In *Schlemmer*, this Court affirmed a directed verdict for the defendant railroad "in view of the circumstances shown * * *" (220 U.S. at 597) and the testimony at trial. That testimony revealed that the plaintiff "met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did" (220 U.S. at 598-599). Thus this Court refused to extend the protection of the Safety Act to a plaintiff who ignored repeated warnings from his superior and co-employees not to attempt the dangerous act.[32]

But at the same time, this Court took care to point out that it found "no occasion to depart" from its decision on an earlier appeal in the same case, since the second decision rested on a record differing "in material respects" from that previously before the Court (220 U.S. at 593). In the earlier decision, *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U.S. 1, 13 (1907), this Court reversed a verdict for a defendant railroad where the state court's ruling on contributory negligence was so "dependent upon an erroneous con-

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[32] Similarly, this Court has suggested that a railroad might escape liability where an adequate coupler failed because of "the work of a saboteur". *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra*, 338 U.S. at 394 n. 7.

struction of the statute that if the judgment stood the statute would suffer a wound." This Court ruled that the plaintiff could not be barred from recovery merely because "he miscalculates the height of the car behind him by an inch * * *," since such negligence would be too closely tied to the risks of railroading, the burden of which Congress has explicitly shifted to the railroads (205 U.S. at 14).

Thus, rather than granting blanket permission for state courts to give broad contributory negligence instructions, particularly if the plaintiff has the burden on that issue, this Court qualitatively analyzed the evidence and affirmed the verdict for the defendant in the second *Schlemmer* decision only in the light of the plaintiff's willful insistence on performing an unnecessary and dangerous act contrary to warnings. The court's instructions in this case, on the other hand, imposed an absolute standard of care on Crane.

Furthermore, the second *Schlemmer* decision noted "the absence of legislation, at the time of the injury complained of, taking away the defense of contributory negligence * * *" (290 U.S. at 597). As we pointed out above, FELA, which became effective after the date of the injury in *Schlemmer,* now provides a source for the rule that the Safety Act bars contributory negligence from excusing the railroad for its violation of the Safety Act.[33]

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[33] Even in employee actions under FELA based solely on negligence and not on Safety Act violations, this Court has ruled as a matter of federal law that the defendant has the burden of showing the plaintiff's contributory negligence. *Central Vt. Ry. Co.* v. *White,* 238 U.S. 507, 512 (1915). The trial court below not only erroneously permitted contributory negligence as a defense to a Safety Act suit but also put the burden on the plaintiff to establish his freedom from any negligence (A. 128-129).

3. Having failed to recognize the intent of Congress to impose strict liability for breach of the Safety Act, and having misinterpreted this Court's decisions construing that Act, the Iowa court turned to state law to find the rule permitting or forbidding contributory negligence as a defense in this action. But both the Safety Act itself and the underlying policy of Congress are paramount in this field and "should be respected accordingly in the courts of [the] State." *Second Employers' Liability Cases,* 223 U.S. 1, 57 (1912). Where the plaintiff's rights arise from violations of a federal standard, federal law (as incorporated into state law) governs what defenses are available under that statute, *Dice* v. *Akron, Canton & Youngstown R.R. Co.,* 342 U.S. 359, 361 (1952), since "the consequences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct * * * ."[34]

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[34] *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U.S. 33, 41-42 (1916). See also *Boyer* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 38 Ill. 2d 31, 230 N.E. 2d 173, 176 (1967), *cert. denied,* 390 U.S. 949 (1968) (federal law determines the availability of defenses to a non-employee Safety Act suit in a state court).

Similarly, this Court stated in *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173, 176 (1942), "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield." See also *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433 (1964); *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 456-58 (1957) (federal law resolves problems which "lie in the penumbra of express [federal] statutory mandates" by "looking at the policy of the legislation * * * ").

As commentators on the Safety Appliance Act have pointed out:

> * * * [T]he Act does something more than impose federal standards on the railroad; it imposes on the state court the federal obligation of selecting, from among the various doctrines available to that court under state law as to the civil consequences of violation of statutory standards, the doctrine consistent with an absolute standard. And there seems to be but one doctrine known to the common law which fits such a standard—the doctrine which, by putting all the risk on the standard's violator, implicitly obliterates the defense of contributory negligence. [Louisell & Anderson, *supra* n. 14 at 291-292.]

Uniform interpretation under federal law of the Safety Act's consequences guarantees even-handed treatment of all persons using railroad equipment covered by the Act, essential to effectuate the statute's "wise and humane" purpose of imposing extraordinary safety obligations and the corresponding strictest liability upon railroads. *Louisville & Nashville R.R. Co.* v. *Layton*, 243 U.S. 617, 621 (1917).

4. What would it mean if the decision below were affirmed? A man performing railroad business on the railroad's system who is injured as a result of the railroad's failure to meet the Act's safety requirements will recover for his injuries, even though contributorily negligent, if he happens to be employed by the violating railroad. Another man, performing the same railroad business on the railroad's system and also injured as a result of precisely the same failure of the railroad to meet the safety requirements of the same Act, will be prohibited from recovering because of the

same contributory negligence that was deemed irrelevant in the other case, if he happens to be employed by some one other than the violating railroad. Congress could not conceivably have intended any such absurd result. Once it is determined, as all concede here, that the injured party is covered by the Act, Congress surely intended that absolute liability be imposed, without regard to the various defenses applicable to common law negligence cases.

Such an unconscionable result as we have outlined above is illustrated in a dramatic fashion by a case now pending on appeal in the Tenth Circuit Court of Appeals. *Hunter* v. *Missouri-Kansas-Texas R.R. Co.*, 276 F. Supp. 936 (N.D. Okl. 1967). In that case a railroad spotted one of its cars on a Halliburton Company siding. The court found that a key pin was missing from the top rod on the car, and that without this key pin the car brakes would not and did not operate. As a result of this brake failure, a Halliburton employee whose job it was to unload the car fell under its moving wheels. His foot was completely severed. Despite the clear violation of the Federal Safety Act, the District Court, unable to find sufficient direction in the opinions of this Court, found the employee guilty of contributory negligence and denied him all recovery.

That case, like this one, points up the absurdity of allowing employees of the violating railroad to recover despite their contributory negligence while employees of shippers and other railroads are denied such recovery, even though covered by the Act. For the fact is that regular railroad employees are far more experienced in handling railroad equipment and thus far more familiar with the hazards of its use and the intricacies

of its operation than are shipper employees. How could Congress have intended that shipper employees, with less knowledge about discovering defective equipment, be held to account for their own mistakes, while railroads are made absolutely liable for injuries to their own employees? The same absurd result would obtain where a railroad which violates the Act injures the employee of another railroad—as, for example, in an interchange accident such as occurred in *Brady*, or where a train with defective brakes rear-ends a train from another railroad.

What Congress intended, we submit, was that when injury results from defective equipment, the party who must bear the burden of the loss should not be the injured party. The reason was not only that the injured party is less able to bear the loss but that the railroad, and the railroad alone, is able to maintain its equipment in the manner and condition required by federal standards. Only the railroad can oversee the installation of such equipment and be responsible for its upkeep. Therefore, the railroad must be held to absolute liability when that equipment for any reason becomes defective and causes, even in part, an injury to persons covered by the Act.

There is ample authority in state court decisions, as well as in the federal cases outlined above, for this approach to safety statutes. For example, in *Le Roy* v. *Missouri, K. & T. Ry. Co.*, 91 Kan. 548, 138 Pac. 646, 647 (1914), the court, excluding contributory negligence as a defense to violation of a mining statute, stated in part:

> * * * the primary [statutory] duty [of the defendant] was to furnish suitable props and keep them

> easy of access to the miners, whose safety and lives depended upon the performance of this duty; and it cannot be permitted to avoid its liability for failure to comply with the statute because some agency employed by it proved untrustworthy. * * *

The Supreme Court of Wisconsin adopted the same position in deciding *Pinoza* v. *Northern Chair Co.*, 152 Wis. 473, 140 N.W. 84 (1913). There the court held that contributory negligence was no defense to an action against an employer based on a violation of a penal statute forbidding employment of minors at certain machinery. Where breach of a statute injures a person whose safety the law was designed to protect, the court said, to allow the defense "would fail to recognize that the law is aimed at conserving the public as well as private interests" (140 N.W. at 86). The fact that the legislature penalized defendant's conduct clearly indicated to the court that "general public policy" imposed "liability to repair the loss" on defendant regardless of contributory negligence or other defenses, such as consent by the minor's parents to his employment.[35]

The same court in *Knecht* v. *Kenyon*, 179 Wis. 523, 192 N.W. 82 (1923), held that where defendant (the owner of a general store) employed plaintiff to thaw out, by means of a kerosene blow torch, a frozen water pipe in a wellhouse where gasoline had been left by a store employee in an unmarked kerosene container in violation of state statute, neither defendant's lack of

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[35] In *Lenahan* v. *Pittston Coal Mining Co.*, 218 Pa. 311, 67 Atl. 642, 643 (1907), the court stated:

> A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation.

knowledge of the presence of the gasoline, nor plaintiff's contributory negligence in placing the blow torch on the floor near the container, provided any defense to plaintiff's action. If such defenses were permitted, the court said, the safety statute itself "would be emasculated and the beneficial results designed to be attained would be frustrated." [36]

Thus these cases further show that statutory imposition of an absolute duty to safeguard against specified dangers carries with it, as its natural consequence, and as the means of completing and giving meaning to the statutory scheme, the abolition of contributory negligence as an excuse for the failure to guarantee the required safety. That is surely what Congress meant to accomplish in the Safety Appliance Act.

This case, then, is analogous to *Reed* v. *The Yaka*, 373 U.S. 410 (1963), in the approach which should be

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[36] Similarly, in *St. Louis & S.F. R.R. Co.* v. *Steele*, 37 Okl. 536, 133 Pac. 209 (1913), the plaintiff fenced all sides of his property but the railroad right of way with hog-wire and then let his hogs into the pasture, knowing that the railroad had failed to fence the right of way as required by statute. The hogs strayed on the railroad track and were killed. The Supreme Court of Oklahoma allowed recovery. Reasoning that the purpose of imposing liability was to enforce the statutory duty, the court stated:

> • • • It is well settled that even though plaintiff turned his hogs into a field, knowing the railroad company had not fenced its track, such fact is no defense to an action for damages for the killing of the hogs. • • •
>
> • • •
>
> And the fact that a herd law, requiring domestic animals to be restrained, was in force at the time of the accident does not, under the facts here presented, alter the obligation imposed on railroads to fence their rights of ways. [133 Pac. at 210.]

taken to the controlling statute. In that case the Court said:

> Thus, there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under *Ryan* shifted the burden of the recovery to petitioner's stevedoring employer. Yet the Court of Appeals held, and Pan-Atlantic would have us hold, that petitioner must me completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner *pro hac vice* of the ship but was also petitioner's employer. In making this argument, Pan-Atlantic has not pointed and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under *Ryan*, the burden ultimately falls on the company whose default caused the injury. Pan-Atlantic relies simply on the literal wording of the statute, and it must be admitted that the statute on its face lends support to Pan-Atlantic's construction. But we cannot now consider the wording of the statute alone. [373 U.S. at 414.]

And so, after a review of its own holdings and the statutory intent, the Court concluded:

> We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from un-

seaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual context, "All were subjected to the same danger. All were entitled to like treatment under law." [*Id.* at 415; footnote deleted.]

Precisely the same situation attains here. All workers on these railroad cars, whether employed by a shipper or by the railroad itself, "were subjected to the same danger. All were entitled to like treatment under law." See *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 413 (1953).

Like treatment under the law in this case means the imposition of absolute liability, which in turn means the elimination of the defense of contributory negligence on the part of the non-employee covered by the Safety Appliance Act. We respectfully urge the Court to so hold.

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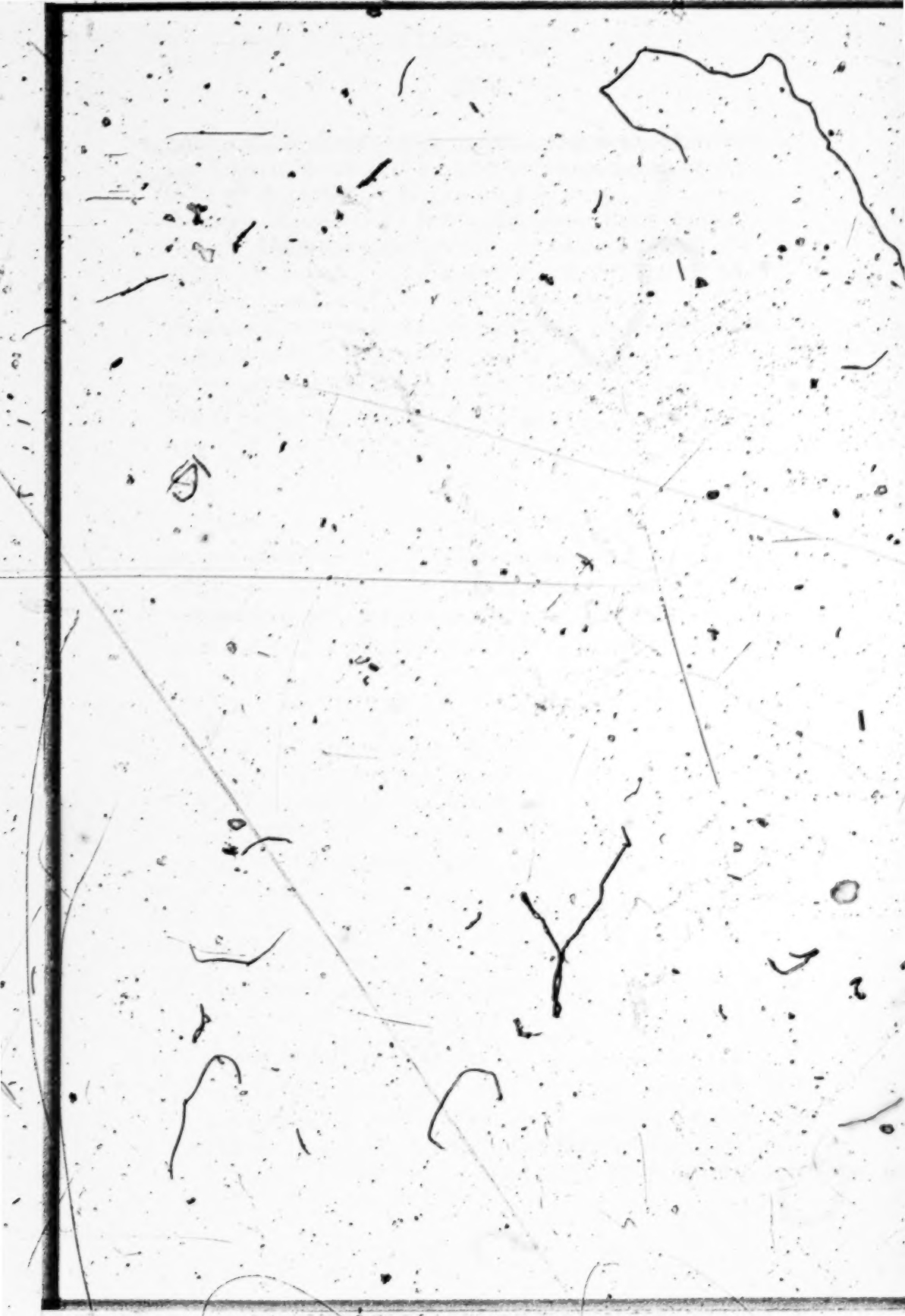

APPENDIX

APPENDIX

APPENDIX A

1. The Federal Safety Appliance Act, 27 Stat. 531 (1893), as amended, 45 U.S.C. § 1, et seq., provides in pertinent part:

§ 2. *Automatic couplers*

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars [27 Stat. 531 (1893), 45 U.S.C. § 2 (1954)]

* * * * * * * * * * *

§ 7. *Assumption of risk by employees*

Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of sections 1-7 of this title shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge. [27 Stat. 532 (1893), 45 U.S.C. § 7 (1954)]

* * * * * * * * * * *

2. The Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51, et seq., provides in pertinent part:

§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury

while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. [35 Stat. 65 (1908) as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1954)]

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§ 53. *Contributory negligence; diminution of damages*

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. [35 Stat. 66 (1908), 45 U.S.C. § 53 (1954)]

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§ 54. *Assumption of risks of employment*

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have as-

sumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. [35 Stat. 66 (1908), as amended 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1954)]

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